SUPREME COURT, U.S.
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Nos. 93-762 and 93-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and CITY OF CHICAGO,
Respondents.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY
and JEROME B. GRUBART, INC.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT GREAT LAKES DREDGE & DOCK COMPANY IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should review the Seventh Circuit's decision sustaining admiralty jurisdiction where that decision is based on the application of settled law—*Sisson v. Ruby*, 497 U.S. 358 (1990)—and no conflict exists in the Circuits.

ADDITIONAL PARTIES PURSUANT TO SUPREME COURT RULES 24.1(b) AND 29.1

Respondent Great Lakes Dredge & Dock Company's parent is Great Lakes International, Inc. Great Lakes International, Inc.'s parent is Great Lakes Dredge & Dock Corporation.

First National Bank of Chicago appeared as a claimant in the underlying district court Limitation Act proceeding.

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BRIEF FOR RESPONDENT GREAT LAKES DREDGE & DOCK COMPANY IN OPPOSITION

Respondent, Great Lakes Dredge & Dock Company, respectfully requests that this Court deny the Petitions for a Writ of Certiorari filed by Petitioners Jerome B. Grubart, Inc. and the City of Chicago.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

UNITED STATES CONSTITUTION

U.S. Const. art. III, § 2.

The judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction . . .

* * * *

JUDICIARY ACT OF 1949

28 U.S.C. § 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

. . .

* * * *

ADMIRALTY EXTENSION ACT

46 U.S.C. § 740.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

. . .

* * * *

VESSEL OWNER'S LIMITATION OF LIABILITY ACT

46 U.S.C. § 183(a).

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or

thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. . . .

46 U.S.C. § 185.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended . . . Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188.

Except as otherwise specifically provided therein, the provisions of the nine preceding sections and of section eighteen of the act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes," approved June twenty-sixth eighteen hundred and eighty-four (23 Stat. 57), shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

* * * *

CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Rule 40(f).

Rehearing Sua Sponte before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe.*)

STATEMENT OF THE CASE

During the summer and fall of 1991, Respondent Great Lakes Dredge & Dock Company ("Great Lakes") performed a marine construction contract it had entered into with Petitioner the City of Chicago ("the City") to remove and replace pile clusters, known in the trade as "dolphins," at five bridge sites in the Chicago River. To perform this work, Great Lakes used a tugboat and barges to extract the old wooden pilings and install new ones. (App. 2); 3 F.3d at 226.[1] Great Lakes' tugboat and

[1] In the Court of Appeals, Great Lakes included all of the Record documents to which it cited in a separately bound Appendix to its opening Brief on Appeal. For consistency, citations in this Brief

barges operated in the navigable channel of the Chicago River, moving out of the channel whenever another vessel sought passage. (App. 22-24, 33-34, 41-42, 51-54, 80). The tugboat also regularly towed the barges from work site to work site and repositioned the barges at the work-sites whenever necessary. *Id.* One of Great Lakes' barges transported the crane used for extracting and driving piles from Great Lakes' yard on the Calumet River to and from each Chicago River work site; this barge also transported the work crews from site to site. (App. 22-24, 41-43, 47). The other barge transported new pilings from Great Lakes' Calumet River yard to the work sites several miles away, stowed the old pilings until the work was completed, and then transported the old pilings back to Great Lakes' yard. (App. 22-24, 33-34, 41-47, 51-54).

Great Lakes' work had to be performed from vessels located in the navigable channel, as the dolphins could not be reached by land. (App. 29, 50, 113-16). The marine construction contract between Great Lakes and the City specifically required Great Lakes to supply all necessary equipment, including "barges, cranes [and] tugs." (App. 113). The contract required Great Lakes to provide a warning about its river activities to commercial navigators and to clear the channel whenever another vessel sought passage. (App. 50-51, 111-12). According to the contract, "the passage of vessels has first priority . . ." (App. 115). Great Lakes provided the requisite notices to the U.S. Coast Guard for publication in its official *Notice to Mariners* and honored vessel rights of passage throughout the months its vessels worked on the river. (App. 22, 24, 33-34, 50-51, 56-72).

On April 13, 1992, water from the Chicago River entered a freight tunnel running under the river through

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to those same documents are denoted "App. ——", as they are in the Court of Appeals. Citations to other documents in the Record are denoted "R. ——". The Seventh Circuit's decision in this case, *Great Lakes Dredge & Dock Co. v. City of Chicago*, is reported at 3 F.3d 225 (7th Cir. 1993).

a breach in the tunnel near the Kinzie Street bridge and quickly flooded the tunnel system underlying Chicago's downtown area, causing flooding to a number of buildings connected to the tunnels. (This event became known as the "Chicago Flood"). As a result, maritime traffic on the Chicago River in the vicinity of the tunnel rupture was disrupted and the Captain of the Port of Chicago closed all three branches of the Chicago River in the downtown Chicago area for more than a month. 3 F.3d at 226 n.1.

In the days and weeks immediately following the Chicago Flood, thousands of individuals and businesses filed suit in Illinois state court against Great Lakes. These plaintiffs alleged that Great Lakes negligently installed the river dolphins at the work site located in the vicinity of the Kinzie Street bridge, thereby causing the breach in the tunnel and, in turn, the Chicago Flood. The plaintiffs also alleged that the City was negligent in the performance of its responsibilities under the dolphin replacement contract, including failing to disclose to Great Lakes the existence of the tunnel in the vicinity of the Kinzie Street work site. 3 F.3d at 226. *See also* App. 4; R. 44, Tab A (state court consolidated class action complaint); *American Protection Ins. Co. v. Great Lakes Dredge & Dock Co.*, No. 93 M1 12557 (1st Municipal District, Cook County, Illinois) (alleging damage to subrogor's floating docks because the level of the river was lowered and then raised).

On October 6, 1992, Great Lakes timely filed an action in federal district court under the Vessel Owner's Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, seeking exoneration from or limitation of liability in connection with its alleged role in causing the Chicago Flood. Great Lakes also asserted that the City was responsible for the Chicago Flood because the City negligently failed to disclose the existence of the tunnel near the Kinzie Street bridge to Great Lakes at the time the City hired Great Lakes to perform the dolphin replacement contract or

at any time thereafter. Great Lakes also contended that the City failed to repair and maintain the tunnel after the City received notice of the breach. 3 F.3d at 226; App. 8-12.

Petitioner Jerome B. Grubart, Inc. ("Grubart"), a Chicago business, filed a claim in the federal admiralty proceeding, and both Grubart and the City moved to dismiss Great Lakes' complaint. Grubart and the City contended that the district court lacked subject matter jurisdiction over Great Lakes' claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and, in the alternative, moved to dismiss Great Lakes' claim pursuant to Rule 12(b)(6) for failure to state a claim. 3 F.3d at 226.

The district court granted the motions to dismiss on both grounds. The Court of Appeals reversed both rulings of the district court. First, the Court of Appeals held that "the incident giving rise to the damage of which the City and Grubart complains satisfies all of the prerequisites of admiralty jurisdiction identified in *Sisson* [*v. Ruby*, 497 U.S. 358 (1990)]." 3 F.2d at 230. Second, the Court of Appeals held that Great Lakes' complaint stated a valid basis for recovery under the Limitation Act. *Id.* at 227, 231-32.

Applying the three-part test identified in *Sisson*, the Court of Appeals first held that the "locality" requirement for admiralty jurisdiction is satisfied. The court noted that "the Chicago River, and all of its branches, is a navigable waterway of the United States. *See Escanaba Co. v. City of Chicago*, 107 U.S. 678, 683 (1883)." 3 F.3d at 229. Moreover, the Court of Appeals stated that there is no dispute that Great Lakes' vessels were located in the "navigable channel" of the Chicago River while engaged in the removal and replacement of the dolphins. *Id.* The Court of Appeals further concluded that "there is no doubt" that Great Lakes' barges are vessels, because they are capable of, and have performed, transportation of passengers, cargo and equipment from place to place over navigable waters. *Id.*

Second, the Court of Appeals held that maritime commerce on the river "was *actually* disrupted for more than a month." *Id.* at 230 (emphasis in original). Thus, the Court held that the installation of pilings from barges located in the navigable channel of the Chicago River not only creates a potential to disrupt commercial maritime activity, but in fact did disrupt maritime commerce. *Id.*

Finally, the Court of Appeals held that "[t]here is no dispute that dolphins are capable of, and generally do, serve . . . the purposes . . . of . . . protecting ships from collisions with bridges and aiding navigation, [which] are unquestionably related to maritime activity." Thus, "the installation of dolphins relates to maritime activity." *Id.*

In their separate Petitions, Grubart and the City challenge only the Court of Appeals' holding that admiralty jurisdiction applies to this case. They do not challenge the Court of Appeals' decision that Great Lakes' complaint properly stated a claim under the Limitation Act.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. This case involves only the Seventh Circuit's application of the well-settled test for admiralty jurisdiction most recently articulated by this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). *See* U.S. Supreme Court Rule 10.1.

2. No conflict in the Circuits exists concerning the appropriate admiralty jurisdiction test. The cases cited by Petitioners do not conflict with the analysis mandated by *Sisson* and conducted by the Seventh Circuit. *Id.*

3. Petitioners' arguments call for nothing more than a review of the correctness of the Seventh Circuit's fact-bound application of the *Sisson* test. *Id.*

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT FULLY CONSIDERED AND PROPERLY APPLIED WELL-SETTLED SUPREME COURT PRECEDENT

The Seventh Circuit adhered to the admiralty jurisdiction test mandated by this Court in *Sisson v. Ruby*, 497 U.S. 358 (1990). Because the Seventh Circuit correctly identified and applied each element of that well-settled test, the Petitions for *Certiorari* should be denied.

A. The Supreme Court's Criteria for Invoking Admiralty Jurisdiction Are Well Settled

Sisson is the third in a trilogy of cases in which this Court established the framework for determining whether admiralty jurisdiction exists in a case. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). Relying on *Executive Jet* and *Foremost*, this Court in *Sisson* identified a three-part test for invoking admiralty jurisdiction. First, the incident must have occurred on navigable waters. *Sisson*, 497 U.S. at 361. Second, based on "the general features of the type of incident involved," the incident must have the "potential [for] disruption to commercial maritime activity." *Id.* at 363. And third, the "general character of the activity" from which the incident arose must have "a substantial relationship to a 'traditional maritime activity.'" *Id.* at 364-65. The Court in *Sisson* stated that this test "provides appropriate and sufficient guidance to the federal courts." *Id.* at 366 n.4.

B. The Seventh Circuit's Analysis Followed the *Sisson* Test

The Seventh Circuit followed the mandate of *Sisson* precisely. Thus, the Court of Appeals framed the admiralty jurisdiction inquiry as follows:

> After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the

> incident giving rise to the alleged wrong: (1) did it occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity? If all three questions are answered in the affirmative, a claim arising out of the incident falls within the admiralty jurisdiction.

Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225, 228 (7th Cir. 1993). Having identified the correct inquiry, the Court of Appeals then analyzed the three questions posed in *Sisson* and answered each in the affirmative. The Court also properly analyzed the impact of the Admiralty Extension Act on this case and applied it precisely as directed by Congress.

1. *The Incident Occurred on the Navigable Waters of the United States*

The Seventh Circuit properly held that the first prong of *Sisson*—the situs element—was met because Great Lakes was charged with alleged negligence in removing and replacing river dolphins off of barges located in the navigable channel of the Chicago River. As the Seventh Circuit correctly concluded, the locality requirement was easily satisfied:

> There can be no doubt that the Chicago River, and all of its branches, is a navigable waterway of the United States. . . . Nor is there any dispute that Great Lakes' vessels were located in the navigable "channel" of the Chicago River while engaged in the removal and replacement of the pile clusters. Hence, it follows that the alleged tort—the negligent driving of pilings into the riverbed—occurred on a navigable waterway.

3 F.3d at 229 (citations omitted).

In addition, the Court of Appeals concluded that the Admiralty Extension Act covered precisely the situation presented by this case. The Admiralty Extension Act provides that admiralty jurisdiction:

> shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740. The Seventh Circuit observed that this Act "seems explicitly to address situations, like this one, where the injury-causing activity occurs on a vessel on a navigable waterway but the injury itself is felt on land. 3 F.3d at 229-30 n.5.

2. *The Incident Posed a Potential Hazard to Maritime Commerce*

Under the second prong of the *Sisson* analysis, the Seventh Circuit properly concluded that the underlying incident disrupted maritime commerce on the Chicago River for over one month. The Court of Appeals stated:

> We are led to ask: Did the installation of pilings from barges located in the navigable channel of the Chicago River create a potential to disrupt commercial maritime activity? This is not a case, like *Foremost* or *Sisson*, in which we must imagine the various ways in which the installation of pilings might disrupt travel on the river. Because commerce on the river was *actually* disrupted for more than a month, this question answers itself. Yes, there was such a potential. In fact, it was realized.

3 F.3d at 230 (emphasis in original; footnotes omitted). This is exactly the inquiry mandated by the *Sisson* Court, which held that the "court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson, supra*, 497 U.S. at 363. No hypothesizing is needed in this case because it is undisputed that commercial barge traffic ceased, commuter ferries were stranded and the Captain of the Port of Chicago closed down the heart of the Chicago River to all maritime traffic for over one month. 3 F.3d at 226 n.1.

3. *The Activity in Which Great Lakes Was Engaged Is Substantially Related to Traditional Maritime Activity*

The Seventh Circuit correctly held that Great Lakes' installation of dolphins into a riverbed from barges located in a navigable river constitutes a traditional maritime activity. As the Court stated:

> we must determine if the activity in which Great Lakes was engaged is substantially related to traditional maritime activity. . . . [W]e are concerned only with "the general character of the activity." *Sisson*, 497 U.S. at 365 . . . There is no dispute that dolphins are capable of, and *generally* do, serve all the purposes mentioned [by the parties], two of which, protecting ships from collisions with bridges and aiding navigation, are unquestionably related to maritime activity. It follows logically that the installation of dolphins is related to maritime activity.

3 F.3d at 230 (emphasis in original; citations omitted). This conclusion is also supported by a century of cases applying admiralty jurisdiction to the installation and repair of pilings in navigable bodies of water.[2]

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[2] *See, e.g., In re The V-14813*, 65 F.2d 789, 790 (5th Cir. 1933) ("[t]here are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters, is subject to maritime jurisdiction"); *In re New York Dock Co.*, 61 F.2d 777 (2d Cir. 1932) (admiralty jurisdiction over scow driving piles for a Harlem River dock); *In re P. Sanford Ross, Inc.*, 196 F. 921 (E.D.N.Y. 1912) (admiralty jurisdiction over pile driving barge whose owner sought limitation), *rev'd on other grounds*, 204 F. 248 (2d Cir. 1913); *Lawrence v. The FLATBOAT*, 84 F. 200 (S.D. Ala. 1897) (admiralty jurisdiction over tort claim involving a pile driver on a flatboat), *aff'd sub nom. Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (5th Cir. 1898).

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CONFLICT AMONG THE CIRCUITS WHERE NONE EXISTS MUST FAIL

Petitioners attempt to manufacture a conflict where none exists by pointing to post-*Sisson* decisions of several Courts of Appeals which have considered multiple factors in analyzing whether an activity is substantially related to traditional maritime activity (the third *Sisson* inquiry). These factors, which Petitioners refer to as the "totality of the circumstances" or the *Kelly* test, identified approximately twenty years ago in *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), include the functions and roles of those involved, the types of vehicles and instrumentalities involved, the type of injury, and traditional concepts of the role of admiralty law. *See, e.g., Sisson*, 497 U.S. at 365 n.4. Petitioners contend that the Seventh Circuit did not expressly consider each of these factors in its analysis of the underlying activity, and therefore a split in the Circuits exists.

Petitioners have identified no conflict at all because the *Kelly* test is simply an articulation of factors that may be, but after *Sisson* are not always, part of the general characteristics of the relevant activity. This Court in *Executive Jet*, *Foremost* and *Sisson* set forth guiding, unifying principles for determining whether the relevant activity, *i.e.*, the activity which gave rise to the incident, is substantially related to traditional maritime activity. 497 U.S. at 364. The first step is to define the relevant activity. *Id.* Then the court determines whether the activity has a substantial relationship to a traditional maritime activity. *Id.* at 364-65. Further, this Court stated that "the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Id.* at 364. In other words, the focus must be "on the general character of the activity." *Id.*

Each of the Circuits which refer to the *Kelly* factors subjects each factor to this "general characteristics" cruci-

ble as required by *Sisson*. *See, e.g., Price v. Price*, 929 F.2d 131, 136 (4th Cir. 1991) (court acknowledged that it was "bound to apply the principles of *Foremost* and *Sisson*" and to that end must ask "whether the core activity giving rise to Mr. Price's alleged negligent conduct was related to an activity which is traditionally maritime"); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 885 (5th Cir. 1993) (in connection with the examination of the *Kelly* factors, "[o]ur analysis today is further guided by the Supreme Court's recent pronouncement in *Sisson*."). *See also Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 314 n.2 (9th Cir. 1993); *Penton v. Pompano Construction Co.*, 976 F.2d 636, 640 (11th Cir. 1992); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 634 (D.C. Cir. 1991).

The Seventh Circuit also precisely followed the analysis mandated by *Sisson*. In determining whether the activity which gave rise to the incident was substantially related to traditional maritime activity, the Court focused, as *Sisson* commands, on "the general character of the activity." 3 F.3d at 230. Therefore, whether or not the Seventh Circuit specifically identified each of the *Kelly* factors, the substance of the analysis, and the result yielded, is the same through adherence to *Sisson*'s principles.

This Court has acknowledged that these approaches are by no means incompatible. In *Sisson*, the Court concluded that it did not need to choose between the *Kelly* approach and other Circuits' approaches, because "the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts." 497 U.S. at 366 n.4.

Thus, the Seventh Circuit's analysis is not in conflict with the analysis of any other Circuit. True to *Sisson*, the Seventh Circuit focused on the general characteristics of

the relevant activity—installation of dolphins off of vessels operating in a navigable river—and gave no weight to those factors which were not part of the general character of the activity. Plaintiffs who have no connection to the activity which gave rise to the incident, except for the damages they allegedly suffered because of the fortuity that they were in harm's way, are not part of the general characteristics of the relevant activity. Nor are they "instrumentalities" in the activity or the incident to which the activity gave rise. 497 U.S. at 365 n.3.

As a result, the Seventh Circuit properly did not give any weight to the occupation of Grubart (a shoe store operator) or the other plaintiffs who had no role in the relevant activity. On the other hand, the City's role in the pertinent events was quintessentially maritime, because the City was the contracting party, with Great Lakes, to the maritime contract for the removal and installation of the dolphins. Thus, contrary to Petitioners' assertions, this is not a case in which one instrumentality is engaged in a traditional maritime activity and the other is not. *Id.* The *Kelly* approach, as guided by *Sisson*'s requirements, yields exactly the same results.

Significantly, no Court of Appeals, including the Seventh Circuit, has declared, or even intimated the existence of, a split in the Circuits or a departure from *Sisson*. The Seventh Circuit panel did not circulate the opinion in this case to all judges in the Circuit in advance of publication as is required for any Seventh Circuit decision which creates a conflict in the Circuits. *See* Seventh Circuit Rule 40(f) ("A proposed opinion . . . which would . . . create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court . . ."). Moreover, Grubart specifically raised its manufactured Circuit split in its petition for rehearing. All of the judges on the original panel voted to deny a rehearing, and no members of the Court requested a vote for rehearing *en banc*. *See* City Petition, p. 19a.

III. THE SEVENTH CIRCUIT'S FACT-BOUND APPLICATION OF THE *SISSON* TEST PROVIDES NO BASIS FOR PLENARY REVIEW

The Seventh Circuit's decision is based on its fact-bound application of the *Sisson* test and does not merit plenary review. *See* Supreme Court Rule 10.1. Furthermore, each of Petitioner's challenges is meritless.

A. The Seventh Circuit Correctly Applied the Admiralty Extension Act

Petitioners claim that the Seventh Circuit misapplied the situs analysis—the first *Sisson* factor. In making this challenge, Petitioners argue that the Seventh Circuit relied on the Admiralty Extension Act to extend the scope of admiralty jurisdiction beyond permissible boundaries. City Petition, p. 11. The City contends that this Court's decision in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), bars application of the Admiralty Extension Act to this case, because the damage which the plaintiffs suffered, occurring as it did six months after Great Lakes allegedly committed the negligence and, in some cases, several blocks from the location of Great Lakes' work, is too "remote" under *Gutierrez* to invoke admiralty jurisdiction. Moreover, according to the City, the Seventh Circuit's "expansive reading of the Admiralty Extension Act" "ignor[ed] the federalism implications of its decision . . ." City Petition, pp. 13, 15. The City complains that the result in this case may be different under admiralty jurisdiction than it would be under Illinois law, because the City may be immune from tort liability under Illinois' Governmental Tort Immunity Act but would lose that immunity if admiralty jurisdiction applies. *See Workman v. New York City*, 179 U.S. 552 (1900).

None of these arguments has any merit. The Court of Appeals carefully addressed the situs element and concluded that the jurisdictional incident occurred on navigable waters. 3 F.3d at 229. After reaching this conclusion,

the Court correctly rejected Petitioners' contention that the situs element was not satisfied because Grubart and many others were damaged on land. As the Court of Appeals noted, the Extension Act expressly provides for admiralty jurisdiction where the injury-causing activity occurs on navigable water but the injury itself is felt on land. 3 F.3d at 229 n.5.

Moreover, as the Seventh Circuit correctly stated, the remoteness concept referred to in *Gutierrez* deals with proximate causation. 3 F.3d at 229. In the present case, the plaintiffs allege that their damages resulted proximately from Great Lakes' negligent performance of its marine construction activities on navigable water. *Id.* at 226. Under *Sisson* the location element is satisfied, and under the Admiralty Extension Act the fact that the damages were felt on land, even though somewhat "remote" in a geographic sense from the location of Great Lakes' alleged negligence, does not take the case out of admiralty jurisdiction. As the Seventh Circuit noted, a contrary result "would render the Admiralty Extension Act meaningless." 3 F.3d at 229-30 n.5.

Still further, the Seventh Circuit's fact-bound analysis in no way violates federalism principles. The Supreme Court has, in its trilogy of jurisdiction cases, supplied the framework for determining whether a case falls within admiralty jurisdiction. The Court's jurisdiction test is in part a product of federalism concerns and was constructed precisely to permit the courts to reach the correct jurisdictional result. This is why the *Sisson* test requires both the situs on navigable water and nexus to traditional maritime activity elements to be satisfied before admiralty jurisdiction will be invoked. If the test is satisfied, then the case falls within admiralty jurisdiction, the federal courts have original jurisdiction and maritime law applies. U.S. Const. art. III, § 2; 28 U.S.C. § 1333; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).[3] As a result,

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[3] Contrary to Petitioners' contention that the Seventh Circuit failed to consider "traditional concepts of the role of admiralty

this case is not at the crossroads of state and federal jurisdiction as the City contends, but squarely within admiralty. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). In such a case, federalism mandates application of admiralty law. The fact that state law may differ from admiralty law on a given issue in a given case has no independent impact on the determination of which jurisdiction the case is subject to in the first instance.[4]

B. The Seventh Circuit Did Not Err in Its Identification of the Relevant Activity and Incident in Issue

Petitioners also argue that the Seventh Circuit mischaracterized the relevant activity and incident to be analyzed. Their arguments are meritless.

Grubart contends that the "activity" bearing a substantial relationship to a traditional maritime activity must be different from the "incident" giving rise to the claim, and that the Court of Appeals incorrectly confused the activity and the incident by defining both as the installation of pilings in a river. Grubart Petition, pp. 17-18. In fact, the Court of Appeals correctly defined the general activity in question as pile driving in a riverbed (3 F.3d at 230), and the incident as "the *negligent* driving of pilings into the riverbed." *Id.* at 229 (emphasis added). The Court's identification of the jurisdictional incident mirrors Grubart's and the other plaintiffs' own contentions in their complaints that Great Lakes' negligent installation of

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law" (City Petition, p. 10), the Seventh Circuit fully considered this issue in determining that the general character of the activity was substantially related to maritime commerce and that all of the other elements of the *Sisson* test were satisfied.

[4] The City's argument that invocation of admiralty jurisdiction is "unjust because [it] may ultimately shield Great Lakes from liability" for much of the damages sought by plaintiffs (City Petition, p. 14) is not a basis for granting plenary review. Great Lakes is merely seeking to exercise the rights granted to it by statute—the Limitation Act. Repealing that right is a legislative, not a judicial, prerogative.

river dolphins is the incident which caused their damage. 3 F.3d at 226.

The City also claims that the Court of Appeals misidentified the activity at issue, but takes a different tack. The City contends that the activity giving rise to the incident "was not pile driving . . . but the operation and maintenance of an underground tunnel." City Petition, p. 17. The City then contends that "failure to repair the tunnel is not substantially related to maritime commerce." *Id.*, p. 18.

In making this argument, the City ignores the plaintiffs' complaints against Great Lakes. Plaintiffs claimed that Great Lakes negligently installed the river dolphins and that Great Lakes' negligence caused the flood and plaintiffs' consequent harm. R. 44, Tab A. *See* 3 F.3d at 226. As the Court of Appeals put it, the alleged "tort at the heart of this litigation [is] Great Lakes' alleged negligence." 3 F.3d at 227.

CONCLUSION

For all of the foregoing reasons, Great Lakes requests that the Petitions for a Writ of *Certiorari* be denied.

Respectfully submitted,

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